

In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:

COUNTRY CLUB
PROPERTIES, INC.

Debtor

CANDYLAND, INC.

Movant

v.

COUNTRY CLUB
PROPERTIES, INC.

Respondent

Chapter 11 Case

Number 95-40318

FILED

at 3 O'clock & 18 min. P.M.

Date 8-29-95

MARY C. BECTON, CLERK *cc*
United States Bankruptcy Court
Savannah, Georgia

MEMORANDUM AND ORDER
ON MOTION FOR RELIEF FROM STAY AND MOTION TO DISMISS

Creditor, Candyland, Inc. ("Candyland") comes before this Court requesting relief from the automatic stay pursuant to the provisions of 11 U.S.C. Section 362(d)(1), (d)(2), and (d)(3), or, in the alternative, for conversion or dismissal

pursuant to the provisions of 11 U.S.C. Section 1112(b). On June 19, 1995, this matter came before this Court for a hearing. Based upon the parties' briefs, the record in the file, and applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

On October 15, 1991, Thomas F. Williams, Anne M. Williams, James E. Defoe, and Susan G. Defoe purchased the Willowpeg Golf Course in Effingham County, Georgia, and attendant personal property for \$2,047,897.00. To finance this action, the group (1) assumed an indebtedness of \$147,897.00 to Bank South, (2) paid \$100,000.00 prior to the closing on October 15, 1991, and (3) executed a financing statement, security deed, and real estate promissory note in the amount of \$1.8 million in favor of South Rincon Development Association all of which it transferred to Candyland. The partners are jointly and severally liable on the note.

The terms of the note required initial payments of \$50,000.00 on April 15, 1992, and October 15, 1992. The remaining \$1.7 million was amortized in three hundred equal installments of \$15,149.34 over a twenty-five year period at an annual interest rate of nine and three-three fourths (9¾%) percent with a balloon payment due in 1998. Item 21 of the Security Deed provided that any transfer of an interest

in the Willowpeg Golf Course by a partner without Candyland's prior written consent constituted an event of default.

Contemporaneous with the sale of the golf course, the purchasers incorporated Country Club Properties, Inc. ("Debtor"), and used it to operate the golf course. The shareholders were Thomas F. Williams, Anne M. Williams, Susan G. Defoe, and Curt Adolphson.¹ Essentially, the parties agreed to let Ms. Williams and Ms. Defoe manage the daily finances of the corporation while Mr. Williams operated the golf course.

Unfortunately, the parties defaulted in their repayment obligations. A poor business climate, unseasonably rainy conditions, possible mismanagement, and marital discord led to the financial decline of the golf course, notwithstanding three loan modification agreements. Candyland instituted foreclosure proceedings in January 1995, with the sale of the property scheduled for the first Tuesday in March. Debtor filed for Chapter 11 relief on February 21, 1995.

On February 21, 1995, prior to the Chapter 11 filing, Susan G. Defoe

¹ Curt Adolphson, Susan G. Defoe's brother, was not an initial purchaser of the real estate. Similarly, James E. Defoe, Susan G. Defoe's ex-husband, only retained an interest in the land and never owned any shares of the debtor corporation.

and Anne Williams each transferred their respective undivided one-quarter interests in the real estate to Debtor. James E. Defoe subsequently conveyed his undivided one-quarter interest on March 23, 1995. Thus, at present, Debtor possesses an undivided three-quarters interest in the land. Thomas F. Williams still retains his initial twenty-five percent interest.

On June 19, 1995, this Court held a hearing to consider a motion for relief from stay, for dismissal, or for conversion filed by Candyland. At the time of the hearing, Debtor had paid \$330,650.46 against the total purchase price of the note covering payments through the latter months of 1994. The parties have admitted or stipulated to the following:

- 1) The fair market value of the golf course equals \$2.3 million;
- 2) Candyland's debt as of July 1, 1995, equals \$1,832,961.21;
- 3) Ad valorem taxes unpaid by Debtor equal \$78,238.73;
- 4) Other claims by creditors total \$168,924.00;
- 5) Actual attorney's fees incurred by the Movant/Creditor through the date of the hearing equals \$30,000.00;
- 6) Debtor's attorney's fees submitted June 30, 1995, equal \$17,498.03;
- 7) Insider loans to the corporation equal \$144,000.00; and

- 8) Property taxes for the year 1995 equal \$28,700.82.

At the end of the hearing, this Court entered an interim order in favor of the Movant pursuant to Section 362(d)(3) conditioning the automatic stay on payments by the Debtor of \$8,000.00 for the month of May and \$13,740.00 due on the thirtieth of each successive month until the matter is resolved. Although the Movant prevailed in the interim, all issues, including a final determination of whether the golf course constitutes "single asset real estate," remained under advisement. The parties subsequently submitted briefs outlining their contentions.

Candyland contends that this matter should be dismissed pursuant to Sections 362(d)(1), (d)(2), and (d)(3), or, in the alternative, for conversion or dismissal pursuant to the provisions of 11 U.S.C. Section 1112(b). Regarding its Section 362(d)(1) motion, Candyland asserts that Debtor has acted in bad faith and that the stay should be removed for "cause." Candyland cites the factors of In re Phoenix Picadilly, Ltd., 849 F.2d 1393 (11th Cir. 1984), and argues that Debtor's situation reflects most if not all of the requirements.² Further, Candyland notes other instances

² Some of the pertinent factors are the following:

- 1) Whether there is a reasonable possibility of an effective reorganization.
- 2) Whether the debtor has only one asset in which it does not hold legal title.
- 3) Whether the debtor has few unsecured creditors whose claims are small in relation to those of the secured creditors.

that may constitute "cause," including the timeliness of only three of thirty-two installment payments, the outstanding property taxes, the failure to perform repairs and modifications, and a transfer of property to Debtor with knowledge that its acquisition would constitute an event of default. Debtor acknowledges its inability to pay its debts, although it argues that this inability alone should not constitute "cause" because it intends to liquidate its assets and pay all debts which it believes constitutes sufficient "good faith."

During the hearing, Debtor proffered a tentative agreement for the sale of the real estate with Richard Miller.³ Requesting an opportunity to sell this real estate through private sale rather than foreclosure for the purpose of salvaging any equity of the partners has been a constant theme of Debtor's throughout these proceedings. Candyland questions Debtor's "good faith" nothing that Debtor has not sold the property nor located a bona fide purchaser.

4) Whether the property is the subject of a pending foreclosure action as a result of arrearage on the debt.

5) Whether the timing of the debtor's filing evidences an intent to delay or frustrate the legitimate efforts of the creditors to enforce their rights under state law.

6) Whether the property was transferred to the debtor for the sole purpose of obtaining protection under the automatic stay of Chapter 11 by filing bankruptcy.

³ The tentative "offer to purchase real estate" from Richard Miller included the assumption of \$1.8 million of the Candyland debt and the securing of \$400,000.00 in loans from a local bank. At a subsequent hearing to consider the allowance of attorneys' fees, Debtor admitted that the contract with Richard Miller was no longer viable.

Candyland also asserts that relief should be granted under Section 362(d)(2). Debtor has conceded that it intends to liquidate the property. Essentially, Candyland argues that because Debtor only possesses a three-quarters interest in the land or approximately \$1,575,000.00 of the stipulated value and that its total indebtedness of \$1.8 million, no equity exists. Debtor responds that it possesses a right of contribution from Thomas Williams which creates an equity cushion.

Finally, Candyland moves for relief under Section 362(d)(3). Candyland considers the golf course "single asset real estate" in accordance with Section 101(51B). Because Debtor failed to file its plan or make payments in an amount equal to interest at a current fair market rate of the creditor's interest, Candyland requests a lifting of the stay. Debtor contends that on May 1, 1995, Debtor offered Candyland \$8,000.00 per month as adequate protection providing for an interest rate of seven (7%) percent, although Candyland rejected the offer. Debtor also disputes defining a golf course as "single asset real estate."

As previously mentioned, this Court ordered relief under Section 362(d)(3) during the interim, conditioning the stay for as long as Debtor makes regular monthly payments of \$13,740.00.

CONCLUSIONS OF LAW

This case is not factually distinguishable from many which come before the Court under challenge as a bad faith filing. Many bankruptcy cases are filed on the eve of foreclosure, after a debtor has defaulted repeatedly, and while all non-bankruptcy remedies have been exhausted. In that sense, many cases are susceptible to dismissal under the criteria of Phoenix Picadilly, supra, and yet not all suffer that consequence. The decision requires a careful balancing of the creditor's rights with that of the debtor for relief and can be made only after weighing the totality of the circumstances. In this case I find that the Movant has met its burden. Not only are the typical circumstances relating to timing of the filing and the pre-bankruptcy performance of the Debtor present, but:

1) Debtor admits no reorganization is feasible; that sale of the golf course is the only possible cause of action, and now nearly six months after filing, no sale is in prospect.

2) Debtor acquired half the property immediately pre-petition, one-fourth after and has yet to acquire the final twenty five percent.

3) While Debtor and the four former owners are closely

related, one of the land owners who transferred the real estate is not a shareholder of Debtor, and one of the shareholders had no interest in the real estate.

4) It is therefore apparent that creditors of the four individuals who owned the real estate are not identical to creditors of the Debtor in identity, amount or substance.

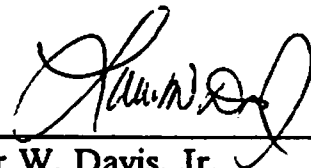
5) The transfer was made at least for the improper purpose of convenience in filing a corporate Chapter 11 rather than multiple individual cases, and at worst may be fraudulent as to creditors of the individuals and preferential as to creditors of the corporation, and constituted an event of default under the note and deed to secure debt.

Upon reflection of the good faith requirements, I conclude that this case fails the test and should be dismissed. It may well be true as Debtor argues that Candyland is better off if Debtor operates and maintains the golf course while attempting to arrange a favorable sale. However, that is not a decision which is appropriate to impose on Candyland given the circumstances of this filing. It may therefore consider whether to work with Debtor outside of this Court purely as a

business decision. Movant's Motion is granted and this case is dismissed.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT
IS THE ORDER OF THIS COURT that the Motion for Relief from Stay and Motion
to Dismiss filed by Candyland, Inc., is granted and this case is dismissed.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 24th day of August, 1995.